No. 82-1465

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED,
and McGREGOR, SWIRE AIR SERVICES LIMITED,

Petitioners,

against

TRANS WORLD AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March 1, 1983

Questions Presented

1. Whether a treaty provision should be enforced notwithstanding a subsequent Act of Congress which abandoned the premise upon which the treaty provision had been based?

2. What is the proper conversion factor, if any, for the gold franc provision in the Warsaw Convention in view of the Congressional decision to eliminate an official price for gold?

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FRANKLIN MINT CORPORATION,
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TRANS WORLD AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services Limited (collectively "Franklin Mint"),[1] request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on September 28, 1982, which affirmed a final judgment of the United States District Court for the Southern District of New York. Specifically, Franklin Mint seeks review of that portion of the

[1]Petitioners' designation of corporate relationships pursuant to Rule 28.1 is stated at page A 36. References in the form "A " are to the pages of the Appendix to this petition.

circuit court's decision declaring presently enforceable (although not prospectively so) a treaty provision, the premise of which was abandoned by an Act of Congress subsequent to the treaty. This petition is a cross-petition to the one filed by Trans World Airlines, Inc. ("TWA")[2] in Docket No. 82-1186.

Opinions Below

The opinion of the court of appeals, reported at 690 F.2d 303 (2d Cir. 1982), is reprinted in the Appendix at A1. The opinion of the district court, reported at 525 F. Supp. 1288 (S.D.N.Y. 1981), is reprinted at A19.

Jurisdiction

The judgment of the court of appeals was issued on September 28, 1982, and entered the same day (A23). TWA subsequently made a timely motion for a rehearing; and this motion was denied by the court on December 1, 1982 (A25). This petition is being filed within ninety days of the circuit court's denial of a rehearing. The Supreme Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. 1254(1).

Treaty and Statutory Provisions Involved

The treaty provision involved is Article 22 of the Warsaw Convention, which is formally known as the Convention for the Unification of Certain Rules Relating To International Transportation By Air, *opened for signature* October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), 137 L.N.T.S. 11, *reprinted*

[2]All the parties to the proceeding in the court of appeals are stated in the caption of this petition.

in 49 U.S.C. §1502 note (1970). Article 22 is set out at page A27.

The statute involved is the Par Value Modification Act, Pub. L. No. 92-268, 86 Stat. 116 (1972), *amended by* Pub. L. No. 93-110, 87 Stat. 352 (1973), *repealed by* Pub. L. No. 94-564, 90 Stat. 2660 (1976). The pertinent sections of the statute are reprinted at A28.

Statement of the Case

In March 1979 Franklin Mint contracted with TWA for the carriage by air of 714 pounds of numismatic articles from the United States to England. The cargo was lost or stolen in transit, and Franklin Mint brought suit for $250,000 to recover the cargo's value. The district court's jurisdiction was founded on both 28 U.S.C. §1331 (federal question) and 28 U.S.C. §1332 (diversity of citizenship).

Following the joinder of issue, TWA moved for partial summary judgment. In a Stipulation and Pre-Motion Order, the parties stipulated to the basic, undisputed facts. It was further agreed, and the district court so ordered, that TWA was liable under the Warsaw Convention for the loss of the cargo. It was also stipulated and ordered that TWA was entitled to limit its liability in accordance with Article 22 of the Convention. As a result, the sole issue presented on TWA's motion was the proper interpretation of the limit in Article 22.

Article 22 states the limitation in air cargo cases to be 250 gold francs per kilogram of cargo. Franklin Mint contended in the district court that this gold franc provision must be converted into dollars by using the only existing price of gold, the free market price. With the elimination by Congress of an official price of gold, the only price for gold in the United States is that set on the open market.

TWA, on the other hand, argued that Article 22 must be interpreted by using one of three other possible units of conversion: (a) Special Drawing Rights ("SDR's") of the International Monetary Fund, (b) the last official price of gold, or (c) the current French franc.

The district court determined that the limit of TWA's liability for its loss of Franklin Mint's property was $6,475.98. This figure was based on a conversion of the gold franc using the last official price of gold. As the cargo had a stipulated value in excess of this limit, and as there were no remaining issues of either fact or law, the district court ordered that judgment be entered for Franklin Mint in the amount of $6,475.98, plus interest and costs. Franklin Mint moved for reconsideration of the decision, and the motion was denied.

Franklin Mint appealed from the final judgment of the district court. Again, the sole issue before the court was the proper interpretation of Article 22 of the Warsaw Convention. The parties repeated their earlier contentions as to the correct method of converting gold francs into dollars.

In an opinion dated 28 September 1982, the Second Circuit held that all four of the proposed conversion factors were subject to strong criticism. The court agreed, however, with Franklin Mint that the elimination by Congress of an official gold price had destroyed the status quo. In the court's view, the "repeal of the Par Value Modification Act was an explicit abandonment of the previously established unit of conversion." 690 F.2d at 311; A17. Congress has failed to substitute a new unit of conversion, and the choice of the proper unit involves a political question. Consequently, substitution of a new unit is not for the courts, with the result that the limit is unenforceable. *Id.*

Although Congress eliminated the official gold price as of 1 April 1978, the Second Circuit's ruling on the liability limit

is prospective only. According to the court of appeals, the limit will be unenforceable "only to events creating liability occurring 60 days from the issuance of the mandate in this case." 690 F.2d at 311-12; A18. Because Franklin Mint had failed to predict how the Second Circuit would treat Congress's repeal of the Par Value Modification Act, the shipper was bound by the last official price of gold. The district court's judgment for $6,475.98 was affirmed.

TWA timely moved for a reconsideration of the decision, with the suggestion of a rehearing en banc. This motion was denied 1 December 1982. The mandate of the court of appeals was stayed upon the filing of TWA's petition in Docket No. 82-1186.

Reasons for Granting the Writ

Certiorari should be granted because this case raises the significant question of whether the courts of the United States should enforce a treaty provision when Congress has eliminated the premise on which the provision was based. While the court of appeals correctly declared the limitation provision of the Warsaw Convention to be unenforceable, the Second Circuit held this ruling to be prospective only. In view of the significant role of the Warsaw Convention in American aviation law, the Court should review this decision of the court of appeals.

POINT I

This case concerns an important question of federal law which should be settled by this Court.

The Warsaw Convention is a multilateral treaty adhered to by over 120 nations. *See* U.S. DEP'T OF STATE, PUB. NO. 9285, TREATIES IN FORCE 270 (1982). It has been called "by far the most widely adopted treaty concerning private international law and after the United Nations Charter one of the

most widely adopted of all treaties . . . ." A. Lowenfeld, *Aviation Law* §4.1, at 7-98 (2d ed. 1981). As a treaty of the United States, it is in this nation the "supreme Law of the land." U.S. Const., art. VI.

The Convention is applicable to all normal international air transportation between the United States and other member nations. *See* Warsaw Convention, Art. 1. In addition, the Convention gives American courts jurisdiction over disputes arising from flights between member countries involving a United States air carrier. Warsaw Convention, Art. 28.

The scope of the Warsaw Convention is a matter of federal law and federal treaty interpretation. *Maugnie* v. *Compagnie Nationale Air France*, 549 F.2d 1256, 1258 (9th Cir.), *cert. denied*, 431 U.S. 974 (1977); *Ricotta* v. *Iberia Lineas Aereas de Espana*, 482 F. Supp. 497, 499 (E.D.N.Y. 1979), *aff'd*, 633 F.2d 206 (2d Cir. 1980); *Husserl* v. *Swiss Air Transport Company, Ltd.*, 388 F. Supp. 1238, 1249 (S.D.N.Y. 1975).

The Warsaw Convention applies to both passengers and cargo. For example, Articles 3 and 4 state the provisions applicable to passenger tickets and baggage checks, while Articles 5-16 pertain to the air waybill. Article 22 provides the carrier with a limitation of liability for claims from both passengers (125,000 gold francs) and cargo (250 gold francs per kilogram of cargo).

Because of the low limitations set in 1929 by the Convention, the issue of the limit is involved in almost all Warsaw Convention litigation. The Convention's limit for a passenger's death is $10,000 when calculated using the last official price of gold.[8] Civil Aeronautics Board Order No. 74-1-16, 39 Fed. Reg. 1526 (1974). In the present case TWA's limit as determined by the

[8]In a private agreement called the Montreal Agreement of 1966, most of the international carriers agreed to accept a limit of $75,000 per passenger. The reason for this waiver to prevent United States withdrawal from the Convention. See A. Lowenfeld, *Aviation Law* §5.3 at 7-128 to 7-144 (2d ed. 1981).

lower courts is about 2.5% of the cargo's claimed value. As a consequence of such low limits, in litigation the crucial issue is often whether the limit can be defeated. *See In re Aircrash Disaster at Warsaw, Poland,* 535 F. Supp. 833 (E.D.N.Y. 1982), *appeal docketed,* No. 82-7616 (2d Cir. Aug. 19, 1982) (passenger); *Bank of Nova Scotia* v. *Pan American World Airways, Inc.,* 16 Av. Cas. 17,378 (S.D.N.Y. 1981) (not officially reported) (cargo).

Prior to 1978 the Convention's liability limits, which are expressed in terms of gold francs, were converted into dollars in accordance with the official price of gold. The elimination by Congress of an official gold price, effective as of 1 April 1978, completely confused the interpretation of this gold franc provision in Article 22. As discussed below in Point II, the federal courts that have faced the issue of how to deal now with Article 22 have resolved the matter in a variety of ways. Because of the critical role of the Warsaw Convention in American aviation law, and because of the crucial nature of Article 22 to the Convention, this Court should determine this important issue of federal law.

Petitioners contend that the limits of liability in Article 22 are unenforceable as of 1 April 1978. The court of appeals erred when it ruled that the limits are only prospectively unenforceable. Alternatively, if these limits are to be enforced, then the gold franc should be converted into dollars by using the only existing price of gold available, the free market price.

POINT II

The federal courts are in disarray over the interpretation of Article 22.

The Par Value Modification Act, Pub. L. No. 92-268, 86 Stat. 116 (1972), *amended by* Pub. L. No. 93-110, 87 Stat.

352 (1973), stated an official, legal relationship between gold and the dollar. As a result, converting the gold franc of Article 22 into dollars was not difficult; and the Civil Aeronautics Board published an order listing the limits for passengers and cargo based on the official price. Civil Aeronautics Board Order No. 74-1-16, 39 Red. Reg. 1526 (1974).

In its Act of October 19, 1976, Pub. L. No. 94-564, 90 Stat. 2660 (1976), the Congress eliminated the official price of gold, effective 1 April 1978. This legislation was to put into domestic effect the international commitment made by the United States as part of the so-called Jamaica Accords of 1975. Under these accords the decision was made to eliminate gold from its central position as the foundation of the international monetary system. See the Second Circuit's description of the relevant economic history at 690 F.2d at 307-8, A8-10.

The difficulty with the Congressional elimination of an official price of gold was that it destroyed the assumption upon which Article 22 had been founded. In both 1929 (when the Convention was drafted) and in 1934 (when the United States adhered to the Convention), there was a price of gold set by statute. Gold Reserve Act of 1934, 48 Stat. 337 (1934); Presidential Proclamation No. 2072 of January 31, 1934, 48 Stat. 1730 (1934); Act of March 14, 1900, ch. 41 §1, 31 Stat. 45 (1900). For the period between 1934 and 1978, therefore, the gold franc in Article 22 posed no problem because the limit was calculated on the basis of the value of gold set by law.

With the elimination of an official gold price, the question consequently arose as to the way by which to convert the Convention's gold franc into U.S. dollars. The federal district courts considering this question have reached a variety of results. The district court in the present case decided to use the last official price of gold. 525 F. Supp. at 1289; A20. Subsequently, in *Boehringer Mannheim Diagnostics, Inc.*, v. *Pan American World Airways, Inc.*, 531 F. Supp. 344 (S.D. Tex. 1981), *appeal*

docketed, No. 81-2519 (5th Cir. Feb. 2, 1982), Judge Ely of the Ninth Circuit, sitting by designation, held that to use the old official price would be to resort to a fiction. Consequently he converted the gold franc with reference to the free market price of gold. In *Kinney Shoe Corp.* v. *Alitalia Airlines*, 15 Av. Cas. 18,509 (S.D.N.Y. 1980) (not officially reported), the district judge made the conversion using the current French franc. Most recently in *In Re Aircrash at Kimpo International Airport, Korea on November 18, 1980*, MDL-482 (C.D. Cal. Feb. 15, 1983) (reprinted at A29), the court ruled that the Article 22 limit is completely unforceable.

The only federal court of appeals to consider the present problem is the Second Circuit's decision in *Franklin Mint*, in which a still different conclusion was reached.

The Senate has had before it since 1977 a set of protocols, called the Montreal Protocols of 1975, that would amend Article 22 to state the limit of liability in terms of SDR's rather than in gold francs. It is questionable whether this provision will ever go into effect.[4] Although the Montreal Protocols were reported out of committee in 1981, the Senate has never voted on them. Likewise the United States has never ratified the two other protocols amending the Convention.[5]

Congress could also presumably resolve the matter by domestic legislation, as has been done in other countries. *See, e.g.*, Sweden's Aviation Act of 1957, Amendment to Article 22, Chapter 9, effective April 27, 1978; United Kingdom's Carriage by Air (Sterling Equivalents) (No. 2) Order 1980, Statutory In-

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[4]Before the Montreal Protocols go into effect internationally, thirty nations must ratify them. To date only about four have done so.

[5]The Hague Protocol of 1955 and the Guatemala City Protocol of 1971. In addition, the Guadalajara Convention of 1961, which supplements the Warsaw Convention, has never been ratified by the United States. All of these Protocols, including the Montreal Protocols of 1975, are reprinted in A. Lowenfeld, *Aviation Law, Documents Supplement* (2d ed. 1981).

struments 1980 No. 1873. There has been, however, no indication of any Congressional intent to do so.

Because of the complete disarray of the federal courts in resolving this fundamental issue concerning the Warsaw Convention, this Court should review the decision of the court of appeals so that the limitation of liability in Article 22 can be held unforceable from 1 April 1978.

CONCLUSION

Certiorari should be granted.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 999—August Term, 1981
(Argued April 22, 1982 Decided September 28, 1982)
Docket No. 82-7012

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
MCGREGOR, SWIRE AIR SERVICES LIMITED,

Plaintiffs-Appellants,

—v.—

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee.

Before:

OAKES, CARDAMONE, and WINTER,

Circuit Judges.

Appeal from a final judgment of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge*, utilizing the last official price of gold to calculate the limit on defendant's liability under the Warsaw Convention.

The Court holds the limitation provision of the Convention prospectively unenforceable and affirms.

JOHN R. FOSTER, New York, New York (Donald M. Waesche, Waesche, Scheinbaum & O'Regan, P.C., New York, New York, of counsel), *for Plaintiffs-*

Appellants Franklin Mint Corporation, Franklin Mint Limited, and McGregor Swire Air Services, Limited.

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WINTER, *Circuit Judge*:

This is an appeal from a final judgment of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge*, limiting the defendant's liability under the Warsaw Convention ("Convention")[1] for loss of cargo. In determining the limit in United States dollars, Judge Knapp utilized the last official price of gold as a unit of conversion and awarded plaintiffs $6,475.98. 525 F.Supp. 1288 (S.D.N.Y. 1981). Plaintiffs appeal, claiming the limit should have been calculated by other methods. While we agree with the result reached in this case and thus affirm, we hold the Convention's limit on liability prospectively unenforceable in United States Courts.

SUMMARY OF THE ISSUES AND DECISION

The facts in this case, if nothing else, are clear cut. In March, 1979, plaintiffs Franklin Mint Corporation, Franklin Mint

[1]The Warsaw Convention is formally known as the "Convention for the Unification of Certain Rules Relating to International Transportation by Air," opened for signature October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (adherence of the United States proclaimed October 29, 1934).

Limited, and McGregor, Swire Air Services Limited (collectively, "Franklin Mint") contracted with defendant Trans World Airlines, Inc. ("TWA") for the carriage by air from the United States to England of 714 pounds of numismatic materials. Though the articles were worth more than $6,500, Franklin Mint made no special declaration of value. The articles were either lost or destroyed, thus rendering TWA liable under Article 18 of the Convention.[2] Because of the absence of a special declaration, TWA sought to limit its liability under Article 22 of the Convention.

Article 22 limits the carrier's liability for injuries to both "checked baggage and . . . goods" and "objects of which the passenger takes charge himself."[3] The various limits are stated

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[2]Article 18 of the Convention reads:

> (1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.
>
> (2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.
>
> (3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

[3]Article 22 of the Convention reads:

> (1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall

(Footnote continued on following page)

in terms of a specified number of French gold or "Poincare" francs, a unit of account consisting of "65½ milligrams of gold at a standard fineness of nine hundred thousandths." The limit on baggage or other goods is 250 Poincare francs per kilogram. The dollar value of that limit is calculated simply by converting the gold value of the specified unit into United States dollars, *e.g.*, the limit per kilogram is 250 multiplied by the dollar value of 65½ milligrams of gold.

The difficulty arises from the fact that when Article 22 was drafted, gold served official monetary functions and its price was set by law. The Convention thus selected it as the unit of conversion in order to ensure judgments of uniform value as well as a stable and easily calculable limitation on liability. The plain but highly troublesome fact is that by international agreement and United States domestic legislation gold has now lost its monetary functions and no longer has an official price. Unfortunately for parties to international airline transactions as well as for us, the terms of Article 22 continue to utilize gold as the

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(Footnote continued from previous page)

not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

unit of conversion. Thus, the parties raise the issue of what unit of account is now to be used to convert judgments under the Convention into United States dollars.

In arguing the issue, the parties offer four alternatives: (i) the last official price of gold in the United States; (ii) the free market price of gold; (iii) the Special Drawing Right ("SDR"), a unit of account established by the International Monetary Fund ("IMF") and recently proposed as a substitute for gold in the as yet unratified Montreal Protocols to the Convention; and (iv) the exchange value of the current French franc. While acknowledging that "the arguments in favor of . . . the SDR [were] most persuasive," Judge Knapp nevertheless held that the last official price of gold was the appropriate standard. This choice was predicated on the view that this standard "has been . . . espoused by the Civil Aeronautics Board ("CAB"), the government agency most intimately concerned with the transaction at hand," and has been "used by all domestic carriers—including TWA—in calculating the dollar value of the Article 22 limitation printed on their tariffs." 525 F.Supp. at 1289.

We share Judge Knapp's doubt about the result. Indeed, there are powerful arguments against each of the proffered solutions. The last official price of gold is a price which has been explicitly repealed by the Congress. See note 11, *infra*, and accompanying text. It thus lacks any status in law or relationship to contemporary currency values. The free market price of gold is the highly volatile price of a commodity determined in part by forces of supply and demand unrelated to currency values. SDR's are a creature of the IMF, modified at will by that body and having no basis in the Convention. The French franc is simply one domestic currency, subject to change by the unilateral act of a single government.

Every proffered solution thus appears to have a devastating argument against it. While the Convention has not been formally

abrogated, enforcement by national judicial tribunals is impossible without their picking and choosing among alternative units of conversion according to their view of which is best as an initial policy matter. We have no power to select a new unit of account. We thus hold the Convention's limitation of liability unenforceable by United States Courts.

BACKGROUND

Drafted in the late 1920's, the Convention was designed both to protect the fledgling aviation industry from the alternatives of ruinous damage suits or exorbitant insurance premiums and to insure a certain degree of uniformity of legal obligation given the expected international character of the industry. *See* A. Lowenfeld and A. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harvard L. Rev. 497, 499-501 (1967) (hereafter "Lowenfeld and Mendelsohn"); *see also Reed* v. *Wiser*, 555 F.2d 1079, 1089 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977) *and* CAB Staff Memorandum, Warsaw Convention Liability Limits, March 18, 1980, at 5-6. (App. at 43-44). A series of rules governing liability, affirmative defenses and limitations accomplished the former goal, while the Convention's international scope accomplished the latter. Articles 17, 18 and 19 enunciate the carrier's liability for personal injuries, for damage or loss of baggage, and for damage due to delay. Articles 20 and 21 establish as affirmative defenses lack of fault and contributory negligence. Finally, Article 22 provides a limitation on the extent of liability for both personal injury and loss of luggage or other goods.

The personal injury limitations amounts have been subject to upward revision from time to time through protocols to the original agreement. These revisions have come in the wake of a continuing debate, with the developed countries, notably the

United States, Great Britain and France, arguing for higher limits, and the less developed nations seeking reduction of the existing limit.[4] Lowenfeld and Mendelsohn at 504. Throughout this period, the level of the limitations on liability for loss or destruction of checked baggage and other goods has remained the same.

Defining recoveries in terms of a specified amount of gold was intended to produce stability and uniformity. Such a common standard allowed the conversion of liability limits into national currencies and insulated recoveries from the vicissitudes of currency fluctuation and devaluation. In drafting the Convention, a proposal to fix recoveries purely in terms of the French franc was rejected by Switzerland on the ground that use of a single national currency rendered the liability limit subject to change by the act of one government. *See* Second International Conference on Private Aeronautical Law, Minutes, October 4-12, 1929,

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[4]In 1955, at The Hague, the conferees would agree only to a doubling of the limit to 250,000 Poincare francs of $16,000. Lowenfeld and Mendelsohn at 504-09. The United States unenthusiastically signed the Hague Protocol a year later, but did not present the treaty to the Senate until July 1959. Lowenfeld and Mendelsohn at 515. The Senate never consented to the Protocol because of its low limit, however, and ultimately the Kennedy/Johnson Administrations actually threatened United States denunciation of the Convention. This threat came in the wake of Congress' failure to enact a legislative package ratifying the Hague Protocol while compelling the purchase by all American air carriers of $50,000 in insurance for each passenger. To avoid United States denunciation, a conference met in Montreal in the spring of 1966. The result of this meeting was the so-called Montreal Agreement "which provided for absolute carrier liability up to $75,000 on all flights into or out of the United States." *Reed* v. *Wiser*, 555 F.2d at 1087. Appeased, the United States withdrew its denunciation. However, it continued to press for an amendment to the Convention raising personal injury liability limits. In 1971, the parties promulgated the Guatemala City Protocol under which personal injury limits were to be raised to $100,000 at the then current exchange rate of $35 per ounce of gold." *Id.* at 1089 n. 12. However, the United States has not ratified that protocol.

Warsaw, at 88-89 (Horner and Legrez trans. 1975), (App. at 247-248). As the Swiss delegate put it, "Naturally one can say 'French franc' but . . . its [France's] national law which determines it, and one need have only a modification of the national law to overturn the essence of this provision." *Id.* at 89-90, (App. at 248-249). Accordingly, the Swiss pressed for a standard which tied the limitation to a gold value regardless of the national currency actually named in the article. *Id.* at 90, (App. at 249). The conferees accepted the Swiss position and stated the limitation in terms of the Poincare franc defined as "65½ milligrams of gold at a standard fineness of nine hundred thousandths." Convention, art. 22 §(4).[5]

From October, 1934, when the United States first adhered to the Convention, until 1978, use of gold as the unit of account posed no problem for United States or the judicial tribunals of other signatory nations. In 1934, the value of gold was set at $35 per troy ounce pursuant to statute, United States Gold Reserve Act of 1934, Pub. L. No. 73-87, 48 Stat. 337 (1934). When the United States became a party to the International Monetary Fund (IMF) in 1945, *see* Bretton Woods Agreements Act, ch. 339, § 2, Pub. L. No. 79-171, 59 Stat. 512 (1945) (codified at 22 U.S.C. § 286 (1976)), it promised to maintain (and, if necessary, redeem) the value of United States dollars in terms of gold. For purposes of the Convention's limits on liability,

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[5]There was only one change made in this standard at the Hague in 1955. To avoid any confusion, the conferees deleted reference to the Poincare franc and defined the specified sums as referring "to a *currency unit* consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred." Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. Mar. L. & Com. 645, 647-48 n. 7 (1974). Since the United States never ratified the Hague Protocol, the old language still governs American courts. That change, however, is entirely formal, since the elimination of any reference to the French franc merely clarified the Convention's desire to use gold, a point never doubted in the United States.

therefore, the relationship of gold and the dollar allowed judicial tribunals to award judgments on a stable, uniform basis.

At the time of Bretton Woods, the United States dollar was grossly undervalued and was actually an asset more valuable than gold. The promise to redeem all dollars in gold could thus be made without having to be fulfilled.[6] From 1955, however, the United States faced a persistent balance of payments deficit. Where once there existed a dollar shortage, there now developed a dollar glut.[7] To compensate, central banks abroad began trading their dollars for gold, and hoarders and speculators began accumulating the metal in increasing amounts. From 1955 to 1968, United States gold reserves plummeted from approximately $24 billion to around $10 billion.[8]

These events led ultimately to the demise of the gold standard. In early 1968, depletion of the United States gold reserve led the central banks of Belgium, the Federal Republic of Germany, Italy, the Netherlands, Switzerland, the United Kingdom and the United States to agree to discontinue supplying gold to private markets. A so-called "two-tier" system of gold pricing—a market price set accordingly and the official price set under Bretton Woods[9]—was thus created. This eased the pressure but could not remedy the essential flaw. In addition to persistent United States balance of payment deficits, international gold reserves grew more slowly than the volume of world economic activity. As a consequence, banks faced pressures to liquidate official holdings in light of readily available market profits. The stage was thus set for abandonment of the Bretton Woods arrangements.

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[6] *See* P. Samuelson, *Economics*, 686-88 (8th ed. 1970).

[7] *Id.* at 690-91.

[8] *Id.* at 691, Figure 36-1.

[9] *See* Asser, *supra* note 6, at 650; Gold, *International Monetary Law: Change, Uncertainty and Ambiguity*, 15 J. Int'l L. & Econ. 323, 340-41; Samuelson, *supra* note 7, at 698-99.

In August, 1971, the United States suspended its commitment to convert dollars for gold.[10] In May, 1972, it devalued the dollar by raising the official price of gold to $38 per ounce. *See* Par Value Modification Act, Pub. L. No. 92-268, § 2, 86 Stat. 116 (1972) (formerly codified at 31 U.S.C. § 449 (1972)). In October, 1973, yet another devaluation raised the price to $42.22 per ounce. *See* Par Value Modification Act, amendments, Pub. L. No. 93-110, § 1, 87 Stat. 352 (1973) (formerly codified at 31 U.S.C. § 449 (1976)).

The dollar's troubles led the IMF to put forth a plan to abolish the official price of gold, to delete references to gold in its articles, and to substitute SDR's as the Fund's reserve asset and unit of account. The plan was proposed in the 1976 Jamaica Accords, was passed by the Fund's members and became effective April 1, 1978. In the interim, the United States passed implementing legislation including a repeal of the Par Value Modification Act of 1973 and the abolition of the official price of gold.[11] Along with the Jamaica Accords, the measure also became effective on April 1, 1978.

This radical change in the international monetary system created an obvious problem under the Warsaw Convention. With gold abandoned as a currency base and the official price repealed, gold became a commodity with a daily fluctuating free market price. That the difficulty in continuing to use gold as a mone-

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[10] *Id.* at 641; *supra* note 6, at 651.

[11] In repealing the official price generally, Congress retained its use for the limited purpose of determining the value of gold held in the form of gold certificates. See 31 U.S.C. §405(b). The Senate noted that this was the "only domestic purpose for which it is necessary to define a fixed relationship between the dollar and gold. . . ." S. Rep. No. 1295, 94th Cong., 2d Sess. 18, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5935, 5966-67.

tary base undermined the Convention's unit of conversion was immediately recognized. Thus, the Warsaw conferees met in Montreal in 1975, even before the Jamaica Accords, and drafted and signed a Protocol substituting SDR's as the Convention's unit of conversion. At the time of the proposal, the SDR was calculated in terms of gold.[12] With the Jamaica Accords, the referent was changed to a basket of 16 national currencies, and in January, 1981, the basket was reduced to five currencies.[13] The Montreal Protocol was presented to the United States Senate in January, 1977 but has not been approved.

Meanwhile, parties to the Convention have utilized a variety of units of conversion. The record shows Sweden and Britain have adopted SDR's for purposes of Warsaw.[14] Both a Netherlands court and the Civil Court of Rome reached the same result.[15] Two French courts have recently decided that the Warsaw unit is to be converted simply into the current French franc.[16] The United States District Court in the Southern District of Texas

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[12]Gold, *supra* note 10, at 345.

[13]Ward, *The SDR in Transport Liability Conventions: Some Clarifications*, 13 J. Mar. L. & Com. 1, 3 (1981).

[14]*See* Sweden's Carriage by Air Act 1957), amendment to Chapter 9, § 22, effective April 27, 1978, (translated and reprinted in App. at 57-61); *see also* the British Carriage by Air (Sterling Equivalents) Order of 1980, Statutory Instrument 1980 No. 281, effective March 21, 1980, (reprinted in App. at 62-63).

[15]*State of the Netherlands* v. *Giant Shipping Corp.*, Rechtspraak van de Week, 30, May, 1981, 321 (Supreme Court of the Netherlands, May 1, 1981) (translated and reprinted in App. at 64-93); *Linee Aerea Italiane* v. *Ricciole* (Rome Civil Court judgment 609/1979, Nov. 14, 1978), (translated and reprinted in App. at 95-108).

[16]*See Chamie* v. *Egyptiar* (Cours d'appel Paris, Jan. 31, 1980) (translated and reprinted in App. at 171-91); *Pakistan Int'l Airlines* v. *Compagnie Air Inter. S.A.*, (Cours d'appel Aix-en-Provence Oct. 31, 1981) (translated and reprinted in App. at 156-70).

recently opted for the free market price of gold,[17] the standard utilized by an Indian court,[18] and a Greek court.[19] Finally, the last official price of gold, chosen by the District Court in this case, was relied upon by Judge Sifton in *In re Air Crash Disaster at Warsaw Poland on March 14, 1980*, 535 F.Supp. 833 (E.D. N.Y. 1982) and is still utilized by the CAB pursuant to a 1974 order.

DISCUSSION

The controlling facts in this case are: (i) enforcement of the Convention's limitation on liability requires a unit of conversion to translate judgments into domestic currency; (ii) there is no longer an internationally agreed upon unit of conversion; and (iii) there is no United States legislation specifying a unit to be used by United States Courts.

The need for a unit of conversion is self-evident. Without it, a rational limit on liability cannot exist, much less one which produces judgments of equal value in different currencies.

The lack of an internationally agreed upon unit is also obvious. The very convening of the Montreal meeting in 1975 was a recognition by the Warsaw parties that the Convention's unit had been eliminated by events. In plain fact, different countries now apply different units. Although the alternatives argued before us yield limitations on TWA's liability in this case ranging from

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[17] *Boehringer Mannheim Diagnotecs, Inc. f/k/a Hycel, Inc.* v. *Pan American World Airways, Inc.*, 531 F.Supp. 344 (S.D. Tex. 1981).

[18] *Kuwait Airways Corp.* v. *Sanghi*, Regular Appeal No. 54 of 1977 (Civil Station, Bangalore, India, August 11, 1978) (reprinted in App. at 265-71).

[19] *Zakoapolos* v. *Olympic Airways Corp.*, No. 256 of 1974 Ct. of App.; 3d Dep't., Athens, Greece (February 15, 1974) (translated and reprinted in App. at 251-54).

less than $6,500 to over $400,000, each has been adopted as the proper unit of account by at least one party, or domestic tribunal of a party, to the Convention. This disarray merely confirms the obvious fact that the Jamaica Accords destroyed the international arrangements which had led to adoption of gold as a unit of conversion.

International disarray is also reflected in the lack of legislation in the United States implementing the Convention by establishing a unit of conversion. While the "last" official price of gold is offered as a possible unit, "last" is really a euphemism for "no longer" or "repealed." The repeal of the Par Value Modification Act in 1978 was in every sense a legislative declaration that the price of $42.22 per troy ounce was no longer recognized by the United States.[20] We fail to see the logic in adopting as a legal standard a specified value for gold which has been specifically rejected by the United States Congress. Congress' action, moreover, as well as that taken by the other parties to the Jamaica Accords, is highly relevant to the Convention. The repeal of the Par Value Modification Act was based on a domestic and international conclusion that the official price of gold was wholly out of touch with economic and monetary reality. Since use of a fixed amount of gold as the Convention's unit was specifically designed to establish a limitation level at a certain value, this repeal must be taken as a statement that the official price no longer reflects that specified value. The case for continuing to use the now repealed price of gold thus finds no support in law or logic.

The CAB order on which Judge Knapp relied was expressly premised on the existence of an official price under the Par Value Modification Act of 1973. The more recent internal CAB memo-

[20]The sole remaining use of the last official price is in determining the value of gold in the form of gold certificates. *See* note 12, *supra*. That is not relevant to the issues here.

randum supporting continuation of that order is based ultimately on a policy determination that the last official price is the best available standard.[21] The inconsistency of the CAB position, however, is starkly evident. It rejects SDR's because the Senate has not approved the Montreal Protocol, while adopting the last official price of gold which has been explicitly rejected by the Congress. The sole criterion supporting the CAB's position appears to be the law of inertia.

The other alternatives have an equally infirm base. Neither the free market price of gold nor the current French franc was ever agreed to by the treaty's framers, both are gross departures from its purposes, and, as to the latter, there is ample evidence that it was specifically rejected. The framers clearly contemplated use of the governmentally fixed price of gold in adopting it as a unit of account in the hope of providing stability.[22] The free market price of gold, however, is simply the daily fluctuating price of a commodity, affected by conditions relating to supply and nonmonetary uses affecting demand. The current French franc is similarly flawed. To enforce it would amount to a deliberate departure from the expressed wishes of the framers to avoid the use of a single national currency subject to unilateral action.

TWA argues that we should adopt the International Monetary Fund's SDR as the unit of conversion. It is true that the SDR was "created by the IMF in 1969 to replace gold and foreign exchange as an international reserve asset."[23] "[M]ember central

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[21]CAB Internal Memorandum, Warsaw Convention Liability Limits, May 20, 1981 (App. at 32-38).

[22]Appellant's reliance on dicta in our decision *Reed* v. *Wiser*, 555 F.2d at 1089 n.12, is misplaced. The *Reed* footnote implied a free market standard under the Guatemala City Protocol which the U.S. has not ratified.

[23]Ward, *supra* note 14, at 2.

banks may exchange SDR's for other convertible currencies and, therefore, SDR balances are actually lines of credit against which reserves may be borrowed for use in central bank operations."[24] As noted above, methods of calculating SDR's have been changed from time to time. They are presently calculated with reference to a so-called basket of five currencies—the U.S. dollar, the Deutsche mark, the French franc, the Japanese yen, and the pound sterling. The amount of each currency in one SDR is a function of the percentage weights which are assigned to each currency in the basket. The dollar value of one SDR is then determined by adding the "dollar values of each currency component based on daily market exchange rates."[25]

Though the value of any one currency in terms of SDR's fluctuates from day to day, SDR fluctuations are generally less extreme than fluctuations in the free market price of gold. The relative stability of the SDR has thus led the Warsaw signatories to propose its substitution as the Convention's unit of account. The proposal was formally drafted in 1975 as part of the Montreal Protocols to the Convention and has been presented to the signatory states for ratification. Though the substitution was supported by the United States, there has been opposition by non-IMF signatories and very few signatories (the United States included) have actually ratified the Protocol.

The inappropriateness of our adopting SDR's as the unit of conversion is plain. The Convention itself contains not the slightest authority for its use and the Senate has thus far declined to ratify the Montreal Protocols. Moreover, the decision in principle to use SDR's is only the first step. After that, a further step must be taken to define the limitation of liability in terms of a particular number of SDR's per kilogram of baggage. In effect, we

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[24] *Id.*

[25] *Id.* at 3.

would have to set the level of the limitation. Finally, the SDR is a creature of an international body, the IMF, and is subject to modification or outright elimination by that body. In fact, the method of calculating SDR's has been changed three times in the last seven years. This Court has no power under the terms of the Convention or relevant domestic source of authority to adopt a unit of conversion variable at the whim of an international body distinct from the parties to the Convention.

It is thus clear that neither international nor domestic sources of law specify a unit of account for purposes of the Convention. We deal here not with ambiguities which may be clarified by reference to underlying purpose or with language which inadequately mirrors the understood intentions of the drafters. For almost two generations, the Convention's limits on liability have been translatable into domestic currency values by application of a clear and easily applied formula. An essential ingredient of that formula has, as a consequence of international action followed by domestic legislation, ceased to exist. What the parties ask us to do is to select, upon the basis of our judgment as to what is best as a matter of policy, a new unit of conversion. We are without authority to do so.

Treaty advice and consent and proposal is the province of the executive and ratification is the exclusive province of the United States Senate. U.S. Const. art. II, § 2, cl. 1; *Doe ex dem. Clark et al.* v. *Braden*, 16 How. 635, 656-57 (1853). While federal courts are necessarily called upon to interpret treaties, *The Federalist* No. 3 (J. Jay) (Rossiter ed. 1961); *see also id.* No. 80 (A. Hamilton), they must observe the line between treaty interpretation on the one hand and negotiation, proposal and advice and consent and ratification on the other. *See Baker* v. *Carr*, 369 U.S. 186, 211-12 (1961). To be sure, great difficulty may arise in ascertaining where that line is drawn and when it has been

crossed.[26] *See, e.g., Goldwater* v. *Carter*, 444 U.S. 996 (1979). However, selection of a unit of conversion and the level of value of a limitation on liability is plainly a matter to be negotiated by the parties, as the history of the Convention demonstrates.

While international disarray as to the proper unit of conversion under the Convention alone might not disable us from enforcing a new unit, such a unit must be selected either through treaty approval by the Senate or by legislation passing both Houses of the Congress. The repeal of the Par Value Modification Act was an explicit abandonment of the previously established unit of conversion. While Congress may not have focused explicitly upon the Convention in repealing that Act, its purpose, abandonment of a price which was out of touch with economic reality, plainly encompasses use of that price to convert judgments to United States currency values. Congress thus abandoned the unit of conversion specified by the Convention and did not substitute a new one. Substitution of a new term is a political question, unfit for judicial resolution. We hold, therefore, that the Convention's limits on liability for loss of cargo are unenforceable in United States Courts.[27]

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[26]Given the lack of an internationally agreed upon standard of conversion, it might be argued that the Convention has been abrogated. However, treaties involve international obligations entered into by coordinate branches of the government and it is not the province of courts to declare treaties abrogated or to afford relief to those (including the parties) who wish to escape their terms. These are not matters for "judicial cognizance." *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1887); *see also Terlinden* v. *Ames*, 184 U.S. 270 (1901). They belong to the executive and legislative departments because they are more properly the domain of "diplomacy and legislation, . . . not . . . the administration of laws." *Whitney* v. *Robertson*, 124 U.S. at 195.

[27]The Convention establishes liability as well as limits it. Note 2, *supra*. Our holding is limited solely to the unenforceability of the limits and we express no view as to the severability of those limits from the rest of the Convention.

CONCLUSION

This ruling is prospective and will apply only to events creating liability occurring 60 days from the issuance of the mandate in this case. Prospective effect is compelled by the fact that this is the first case in which a court has declined to enforce the Convention's limits on liability. The parties assumed our power to select a new unit and thus our "resolution was not clearly foreshadowed." *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971). Parties to transactions covered by the Convention should have time to adjust their affairs to this ruling. *Cf. Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 50 U.S.L.W. 4892 (U.S. June 28, 1982) (judgment holding Bankruptcy Act unconstitutional stayed until October 4, 1982). As to events occurring before that date, we hold that the last official price of gold shall be used to calculate the limits on liability. Because of both the CAB ruling discussed above and the lack of alternatives, air carriers, at least in this country, have relied on the last official price of gold. All carriers have thus filed tariffs that comply with that standard and substantial "injustice and hardship" would result were they not allowed time to reformulate those tariffs. Other parties may continue to protect themselves through insurance.

Affirmed.

Memorandum and Order of the United States District Court for the Southern District of New York and amendment thereto

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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81 Civ. 1700 (WK)

FRANKLIN MINT CORPORATION,
FRANKLIN MINT, LIMITED, and
MCGREGOR, SWIRE AIR SERVICES, LIMITED,

Plaintiffs,

—against—

TRANS WORLD AIRLINES, INC.,

Defendant.

MEMORANDUM AND ORDER

WHITMAN KNAPP, D.J.

On March 23, 1979, plaintiff Franklin Mint Corporation ("Franklin") delivered to defendant Trans World Airlines, Inc. ("TWA") for carriage from Philadelphia, Pennsylvania to London's Heathrow Airport, four packages weighing some 714 pounds. Although the packages are said to have contained a large quantity of valuable coins, Franklin made no special declaration of value at the time of delivery. TWA charged Franklin $544.96 for the shipment. The four packages never arrived at their destination, and Franklin brought this action to recover their full value, which it fixes at $250,000. The parties agree

that this action is governed by the terms of the Warsaw Convention, and that TWA is liable for the loss. Before us is a motion by TWA for partial summary judgment as to the extent of its liability. We grant that motion in part and deny it in part.

Article 22 of the Warsaw Convention provides that, unless a special declaration of value is made at the time of delivery, a shipper's liability for checked baggage and goods is limited to the equivalent of 250 francs per kilogram. Article 22 states, moreover, that this limitation of 250 francs:

> "shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths [the so-called Poincare franc]. These sums may *be converted into any national currency* in round figures." (Emphasis added.)

Counsel for TWA, in an extraordinary lucid and comprehensive brief, has suggested three possible bases for the calculation converting the Article 22 limitation into United States dollars: (1) the Special Drawing Right ("SDR"), used by members of the International Monetary Fund ("IMF") as a unit of account; (2) the last official price of gold in the United States; and (3) the exchange value of the current French franc. Counsel for Franklin, in an equally able brief, suggests a fourth possibility: the free market price of gold.

Were we writing on a clean slate, we would find the arguments in favor of the first of TWA's suggestions (the SDR) most persuasive. However, TWA's second suggestion (the last official price of gold in the United States) has—arguably, at least—been espoused by the Civil Aeronautics Board ("CAB"), the government agency most intimately concerned with the transaction at hand. It therefore comes as close as anything to constituting a governmental interpretation of the Article 22 limitation. Also, it

is used by all domestic carriers—including TWA—in calculating the dollar value of the Article 22 limitation printed on their tariffs. It would seem to follow that the parties intended to adopt the last official price of gold as the basis for converting the Article 22 limitation into dollars in the instant case.

Beyond saying the foregoing we can, since there are no disputed issues of fact upon which a finding by us is required, see no purpose to be served by delaying a decision while we seek to put in our own words the arguments so cogently expressed by counsel for TWA. Accordingly, we simply adopt those arguments to the extent that they support our conclusion that the conversion should be premised on the last official price of gold in the United States.

Let counsel for TWA submit a proposed order on ten days notice. As we understand the stipulation of the parties, such an order would in effect direct that judgment be entered for plaintiff in the amount of $6,475.98 plus interest and costs, a result which would permit immediate appeal from this order.

SO ORDERED.

Dated:
New York, New York
November 6, 1981

/s/ Whitman Knapp
WHITMAN KNAPP
U.S.D.J.

Memorandum and Order of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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81 Civ. 1700 (WK)

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
MCGREGOR, SWIRE AIR SERVICES, LIMITED,

Plaintiffs,

—against—

TRANS WORLD AIRLINES, INC.,

Defendant.

ORDER

WHITMAN KNAPP, D.J.

The first sentence of the second paragraph of our November 6, 1981 Memorandum and Order is hereby amended to read:

> "Article 22 of the Warsaw convention provides that, unless a special declaration of value is made at the time of a delivery, a carrier's liability for checked baggage and goods is limited to the equivalent of 250 francs per kilogram."

SO ORDERED.

Dated: New York, New York
December 18, 1981

WHITMAN KNAPP, U.S.D.J.

Judgment of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of September one thousand nine hundred and eighty-two.

Present:

HON. JAMES L. OAKES
HON. RICHARD J. CARDAMONE
HON. RALPH K. WINTER

Circuit Judges.

No. 82-7012

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
MCGREGOR, SWIRE AIR SERVICES, LIMITED,

Plaintiffs-Appellants,

—v.—

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record

from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk

by /s/ Arthur Heller
ARTHUR HELLER
Deputy Clerk

Order of the United States Court of Appeals for the Second Circuit denying rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 82-7012

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the first day of December one thousand nine hundred and eighty-two.

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
MCGREGOR, SWIRE AIR SERVICES, LIMITED,

Plaintiffs-Appellants,

—v.—

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee, Trans World Airlines, Inc.,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active

service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, *Clerk*

by:
FRANCIS X. GINDHART
Francis X. Gindhart
Chief Deputy Clerk

Article 22 of the Warsaw Convention

CONVENTION FOR UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR

Article 22

(1) In the transportation of passengers, the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself, the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ miligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Par Value Modification Act

Pub. L. No. 92-268, § 2, 86 Stat. 116, 117 (1972):

> SEC. 2. The Secretary of the Treasury is hereby authorized and directed to take the steps necessary to establish a new par value of the dollar of $1 equals one thirty-eighth of a fine troy ounce of gold. When established such par value shall be the legal standard for defining the relationship of the dollar to gold for the purpose of issuing gold certificates pursuant to section 14(c) of the Gold Reserve Act of 1934 (31 U.S.C. 405b).

Pub. L. No. 93-110, § 1, 87 Stat. 352 (1973):

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the first sentence of section 2 of the Par Value Modification Act is amended by striking out the words "one thirty-eighth of a fine troy ounce of gold" and inserting in lieu thereof the following: "0.828948 Special Drawing Right or, the equivalent in terms of gold, of forty-two and two-ninths dollars per fine troy ounce of gold".

Pub. L. No. 94-564, § 6, 90 Stat. 2660, 2661 (1976):

> SEC. 6. Section 2 of the Par Value Modification Act (31 U.S.C. 449) is hereby repealed.

In re Aircrash at Kimpo International Airport Korea on November 18, 1980, MDL-482 (C.D. Cal. Feb. 15 1983)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL-482

MEMORANDUM OPINION

In Re Aircrash at Kimpo International Airport, Korea on November 18, 1980

BACKGROUND

On November 18, 1980, a Korean Air Lines ("Korean") jet crashed after a flight from the United States to Kimpo International Airport near Seoul, Korea. Several passengers, including plaintiffs' decedents, were killed. Others, including some plaintiffs, were injured. They now seek to recover damages.

The issues presented to this court are 1) whether the Warsaw Convention ("Convention") limits the damages recoverable for death or personal injury that results from an accident involving an international air carrier, and 2) the method of calculating damages if the Convention is applied.

The plaintiffs urge this court to strike the defense of the Convention's limitation on liability, asserting that, *inter alia*, there was insufficient notice of the applicability of the Convention to that particular flight and California's Wrongful Death Statute, Cal. Code Civ. Proc. §377, provides the plaintiffs an independent basis for suit. Alternatively, plaintiffs suggest that, if the Convention is applicable, the method of converting the limitation into dollars should be based upon the free market price of gold, rather than any of the other possible conversion methods discussed below.

The Warsaw Convention

The Convention is a multilateral treaty drafted in 1929 and adhered to by most countries that have international airlines. The United States adhered to the Convention in 1934. 49 Stat. 3000 (1934). A primary purpose of the Convention is to limit the liability of international air carriers in the event of an accident or loss.

Article 22 sets a limit of 125,000 "Poincare" francs as damages for injury to passengers. Article 22(4) defines the franc as a gold coin consisting of 65.5 milligrams of gold "which may be converted into any national currency in round figures." The dollar value is calculated by converting the gold value into United States dollars. In 1965, this represented a ceiling on damages of $8,291.88. The United States expressed dissatisfaction with this low amount and gave the necessary six month's notice to formally denounce the Convention.

As a result, the international carriers met in Montreal and drafted the Montreal Agreement ("Agreement"), which provides that the airlines accept absolute liability for injury to passengers up to a limit of $75,000 per passenger. The Agreement is a special contract under Article 22 which allows the parties to agree to a higher limit than that provided for by the Convention. However, Article 23 prohibits "[a]ny provision tending to relieve the carrier of liability or to fix a lower limit than . . . this convention. . . ." Therefore, Article 22, or special contracts allowed by it, cannot be a vehicle to reduce the liability of a carrier below the Convention limits. The Civil Aeronautics Board ("CAB"), in Order No. E-23680, 31 Fed. Reg. 7302 (1966), ordered carriers to use this higher limit if the point of departure or a planned stop was in the United States.

It should be noted that not all airlines or countries are par-

ties to the Agreement. If they are not, the Convention's lower limits are still applicable. Furthermore, some parties, including Korea but not the United States, are parties to the Hague Protocol of 1955, which doubled the Convention limits to 250,000 Poincare francs.

Two other protocols, the Guatemala Protocol and the Montreal Protocol, contain amendments to Article 22 changing the unit of reference from the Poincare franc to the Special Drawing Right ("SDR") of the International Monetary Fund ("IMF"). However, these protocols have been ratified by very few countries. The United States Senate has not ratified either.

The Gold Standard

When the Convention was drafted, gold served official monetary functions internationally, and its price was set by law in most countries, including the United States. It was selected as the unit of conversion to ensure judgments of uniform value as well as a stable and easily calculable limitation on liability.

In 1976, Congress repealed Section 2 of the Par Value Modification Act, 31 U.S.C. §449, thus abolishing the official price of gold. However, the CAB and the airlines in the United States continued to rely upon the last official price as the method to determine liability under the Convention.

However, other parties to the Convention have chosen other conversion methods. French courts have held that the current French franc is comparable to the Poincare franc and is to be used as the measure of liability under the Convention.[1] The

[1]*See, Chamie* v. *Egyptiar* (Cours d'appel Paris, Jan. 31, 1980); *Pakistan Int'l Airlines v. Compagnie Air Inter. S.A.*, (Cours d'appel Aix-en-Provence Oct. 31, 1981).

SDR has been adopted legislatively by Britain[2] and Sweden[3] and by court decisions in the Netherlands[4] and Italy.[5] Courts in India[6] and Greece[7] and a United States District Court for the Southern District of Texas[8] have chosen the free market price of gold.

Because there are four units of conversion currently recognized, this court is asked to select the correct one. The four methods are: (1) the last official price of gold, (2) the free market price of gold, (3) the Special Drawing Right ("SDR") of the International Monetary Fund ("IMF"), and (4) the current French franc.

DISCUSSION

Which of the four available units of conversion is to be used to measure liability under the Convention is an open question in this circuit. *In Re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1305 n.2 (9th Cir. 1982). However, a month after the Ninth Circuit decided *Bali*, the Second Circuit addressed that issue. *Franklin Mint Corp.* v. *Trans World Air-*

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[2]The British Carriage by Air (Sterling Equivalents) Order of 1980, Statutory Instrument 1980 No. 281, effective March 21, 1980.

[3]Carriage by Air Act (1957), amendment to Chapter 9, §22, effective April 27, 1978.

[4]*State of the Netherlands* v. *Giant Shipping Corp.*, Rechtspraak van de Week, 30, May, 1981, 321 (Supreme Court of the Netherlands, May 1, 1981).

[5]*Linee Aerea Italiane* v. *Ricciole*, (Rome Civil Court Judgment 609/1979, Nov. 14, 1978).

[6]*Kuwait Airways Corp.* v. *Sanghi*, Regular Appeal No. 54 of 1957 (Civil Station, Bangalore, India, August 11, 1978).

[7]*Zakoapolos* v. *Olimpic Airways Corp.*, No. 256 of 1974 Ct. of App.; 3d Dep't., Athens, Greece (February 15, 1974).

[8]*Boehringer Mannheim Diagnotecs, Inc. f/k/a Hycel, Inc.* v. *Pan American World Airways, Inc.*, 531 F. Supp. 344 (S.D. Tex. 1981).

lines, Inc., 525 F. Supp. 1288 (S.D.N.Y. 1981), *aff'd* 690 F. 2d 303 (2d Cir. 1982). The *Franklin Mint* trial court had determined that the CAB's reliance on the last official price of gold was persuasive and ruled that that unit of measure was still applicable. The Second Circuit held that selection of a unit of conversion was a political question unfit for judicial resolution. Therefore, the Convention's limits on liability were rendered unenforceable. However, the court made its ruling prospective and otherwise affirmed the trial court.

In discussing three of the four currently available units of conversion, the Second Circuit noted:

> Neither the free market price of gold nor the current French franc was ever agreed to by the treaty's framers, and as to the latter, there is ample evidence that it was specifically rejected. . . . The free market price of gold, however, is simply the daily fluctuating price of a commodity, affected by conditions relating to supply and nonmonetary uses affecting demand. The French franc is similarly flawed.
>
> * * *
>
> The inappropriateness of . . . adopting SDR's as the unit of conversion is plain. The Convention itself contains not the slightest authority for its use and the Senate has thus far declined to ratify the Montreal Protocols. Moreover, the decision . . . to use SDR's is only the first step. After that, a further step must be taken to define the limitation of liability in terms of a particular number of SDR's . . . Finally, the SDR is a creature of an international body, the IMF, and is subject to modification or outright elimination by that body.

690 F.2d at 310.

After consideration of the fourth unit of conversion, the last

official price of gold used by the court below, the Second Circuit held:

> The repeal of the Par Value Modification Act was an explicit abandonment of the previously establishment unit of conversion. While Congress may not have focused explicitly upon the Convention in repealing that Act, its purpose, abandonment of a price which was out of touch with economic reality, plainly encompasses use of that price to convert judgments to United States currency values. Congress thus abandoned the unit of conversion specified by the Convention and did not substitute a new one. Substitution of a new term is a political question, unfit for judicial resolution. We hold, therefore, that the Convention's limits on liability . . . are unenforceable in United States Courts.

690 F.2d at 311.

The well-reasoned, comprehensive *Franklin Mint* opinion has persuaded this court that, indeed, the limitation on damages that is imposed by the Convention is unenforceable.

The Second Circuit made its decision prospective, expressly limiting its effect to events occurring at least 60 days from the decision. 690 F.2d at 312. However, in its discussion the court noted:

> The need for a unit of conversion is self-evident. Without it, a rational limit on liability cannot exist, much less one which produces judgments of equal value in different currencies.
>
> The lack of an internationally agreed upon unit is also obvious. The very convening of the Montreal meeting in 1975 was a recognition by the Warsaw parties that the Convention's unit had been eliminated by events.

690 F.2d at 309.

It is clearly established that the airlines knew that "a rational limit on liability cannot exist" without an internationally agreed upon unit and "the Montreal meeting in 1975 was a recognition by the Warsaw parties that the Convention's unit had been eliminated." Therefore, airlines, including Korean, presumptively knew that this "international disarray" would prevent the Convention from shielding them in any rational manner, and they would be expected to protect themselves and obtain additional insurance.

Furthermore, the knowledge of this "international disarray" and the "recognition by the Warsaw parties that the Convention's unit has been eliminated by events," contrary to the holding in *Franklin Mint*, would allow the airlines to see—as early as 1975—that, eventually, a court would refuse to enforce the Convention. Therefore, this Court's decision as to the enforceability of the Convention is applicable to this action.

On the basis of the unenforceability of the damages limitation imposed by the Convention, the plaintiffs' motion to strike the defense of the Warsaw Convention is granted.

Dated: February 15, 1983

/s/ TERRY J. HATTER, JR.
United States District Judge

Designation of Corporate Relationships

Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services Limited, filing this petition for a writ of certiorari as petitioners in this proceeding, state that:

1. This is their original Designation of Corporate Relationships.

2. Franklin Mint Corporation is a subsidiary of Warner Communications, Inc.

3. Franklin Mint, limited is a subsidiary of Warner Communications, Inc. (U.K.), which is in turn a subsidiary of Warner Communications, Inc.

4. McGregor, Swire Air Services Limited, presently known as McGregor Sea & Air Services, Ltd., is a subsidiary of Ocean Cory, Ltd., which is in turn a subsidiary of Ocean Transport & Trading plc.

5. Affiliates and subsidiaries of Franklin Mint Corporation and Franklin Mint, Limited are:

Atari, Inc.
Atlantic Records
WEA Corp.
WEA Manufacturing
Warner Bros.
Panavision
DC Comics
Warner Cosmetics
Warner Amex Cable Communications
Knickerbocker Toy
Elektra/Asylum/Nonesuch Records
Warner Special Prods.
Warner Bros. Television
Warner Home Video
Mad Magazine

Cosmos Soccer
Warner Amex Satellite Entertainment Co.
Malibu Grand Prix
Warner Bros. Records
WEA International
Warner Bros. Music Publishing
Licencing Corp. of America
Warner Books
Warner Publisher Services
Warner Theatre Prods.

6. Affiliates and subsidiaries of McGregor, Swire Air Services Limited are:

McGregor Uyeno K.K.
Calayan Co., Ltd.
McGregor Swire Air Services (Malaysia) Sdn. Bhd.
G.E. Green & Co. Pty., Ltd.
MSAS SRL
Society Francaise Wm. Cory et Fils
MSAS Transport GmbH

No. 82-1465

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and MCGREGOR, SWIRE AIR SERVICES LIMITED,

Petitioners,

v.

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

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May 20, 1983

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PRELIMINARY STATEMENT

Respondent, Trans World Airlines, Inc. ("TWA"),[1] submits this brief in response to the petition for certiorari filed by Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services Limited (collectively "Franklin Mint") on March 1, 1983. This brief is filed pursuant to the Court's request, by letter dated April 20, 1983, that TWA respond to Franklin Mint's petition for certiorari on or before May 20, 1983.

PRIOR PROCEEDINGS BEFORE THIS COURT

This action was initially brought before the Court by TWA's petition for a writ of certiorari, dated January 15, 1983 (No. 82-1186), seeking review of the same judgment and opinion of the United States Court of Appeals for the Second Circuit which underlies Franklin Mint's petition. In its petition, TWA submitted that the Second Circuit abrogated the Warsaw Convention by nullifying its limitation of liability provisions even though the treaty is capable of enforcement. By so holding, the Second Circuit acted beyond its constitutional power and impermissibly infringed upon the powers reserved to coordinate branches of the Federal Government (TWA's petition at 9-14).

Rather than responding to TWA's petition for certiorari, Franklin Mint timely filed its own petition for certiorari on March 1, 1983 (No. 82-1465), seeking review of the Second Circuit's decision. Thereafter, by a letter dated March 7, 1983, the Court requested Franklin Mint to file a response to TWA's petition. That response was filed on April 5, 1983.

In addition to the parties' petitions for certiorari and Franklin Mint's response to TWA's petition, three non-parties have filed *amicus curiae* briefs. On January 20, 1983, the International Air Transport Association and 43 of its member airlines filed an *amicus curiae* brief in support of TWA's petition for certiorari, which in the alternative requested leave to intervene in No. 82-1186. On February 7, 1983, the Air Transport Association of

1. Pursuant to Rule 28.1 of this Court, respondent states that TWA is a wholly owned subsidiary of Trans World Corporation.

America ("ATA") filed an *amicus* brief in support of TWA's petition for certiorari in No. 82-1186. Finally, on April 7, 1983, the United States filed an *amicus* brief in both No. 82-1186 and No. 82-1465, urging the Court to grant both parties' petitions for certiorari, largely for the constitutional reasons set forth in TWA's petition.

ARGUMENT

POINT I

BOTH FRANKLIN MINT'S AND TWA'S PETITIONS FOR CERTIORARI SHOULD BE GRANTED

Franklin Mint offers two reasons why this Court should grant certiorari: (i) "[t]his case concerns an important question of federal law which should be settled by this Court" (Franklin Mint's petition at 5); and (ii) "[t]he federal courts are in disarray over the interpretation of Article 22" of the Warsaw Convention (Franklin Mint's petition at 7). TWA agrees with both of those contentions, as well as with Franklin Mint's assessment that these factors are of sufficient importance to merit consideration by this Court.

As demonstrated by the briefs previously filed by the parties, as well as by those of the *amici curiae*, the limitation of liability provisions of the Warsaw Convention, as interpreted by federal law, are the basis upon which both international shippers of air cargo and international air carriers make far-reaching economic decisions. Those decisions affect not only the aviation industry but also the numerous industries in which the shippers are engaged. Since the Second Circuit's decision raises major difficulties for both international air carriers and shippers alike, and since it leaves many questions unresolved, that decision, even disregarding its significant constitutional infirmities, should be reviewed by this Court.[2]

2. The difficulties inherent in the Second Circuit opinion have been reviewed at length in the petitions and briefs already before the Court. As the United States points out, if the Second Circuit's decision is "allowed to stand, [it] will have significant adverse consequences for the

(footnote continued on next page)

Franklin Mint also accurately states that the federal courts are in disarray over the interpretation of Article 22.[3] Of the three federal courts which have decided the identical issue raised by these petitions subsequent to the Second Circuit's decision, not one has followed it. See *Deere & Co. v. Deutsche Lufthansa AG*, No. 81 C 4726 (N.D. Ill. Dec. 30, 1982) (reprinted at A-61 of the appendix to TWA's petition in No. 82-1186) (last official price of gold applied because a treaty capable of enforcement must be enforced); *In re Aircrash at Kimpo International Airport, Korea on November 18, 1980*, No. MDL-482 (C.D. Cal. Feb. 15, 1983) (reprinted at A29 of the appendix to Franklin Mint's petition in No. 82-1465) (Article 22 completely unenforceable effective April 1, 1978), *interlocutory review denied*, No. 83-8051 (9th Cir. May 13, 1983); and *Maschinenfabrik*

(footnote continued from previous page)
United States both in its immediate application to the Warsaw Convention and in its broader implications for the treaty obligations of this country generally" (United States' brief at 2). Indeed, the Department of State has already reported that "several foreign governments have expressed their view that the court of appeals' decision will seriously affect United States relations in international aviation" (*id.* at 2-3). Yet a further example of the difficulties engendered by the Second Circuit's decision is the virtual certainty that "travelers, shippers and the nation's flag carriers would have to cope with a maze of widely differing legal systems and philosophies of recompense, if the Convention ceases to be a viable treaty" (ATA's brief at 50).

3. Franklin Mint's petition is not, however, entirely accurate. For example, Franklin Mint incorrectly states that "[w]ith the elimination by Congress of an official price of gold, the only price for gold in the United States is that set on the open market" (Franklin Mint's petition at 3). In fact, the last official price of gold "is retained for some purposes under the [International Monetary] Fund's Articles, and . . . has normative effects on some of the Fund's activities" (J. Gold, *SDRs, Gold, and Currencies*, IMF Pamphlet Series No. 26, at 40 (Washington, D.C. 1979)).

Moreover, the last official price of gold continues to serve a number of functions in the United States. The price of $42.22 per troy ounce of gold is currently used to govern the issuance of gold certificates by the United States Treasury (*id.*; *see also* United States' brief at 13); to express the value of the gold reserves of the United States (United States' brief at 13); and to determine the amount of the United States' subscription obligations to several major international financial institutions (*id.* at 13-14).

Kern, A.G. v. Northwest Airlines, Inc., No. 81 C 656 (N.D. Ill. April 5, 1983) (reprinted at A-1) (last official price of gold applied).

As the court observed in *Northwest*:

> To conclude as the Second Circuit did in *Franklin Mint* that the action of Congress in eliminating an official price of gold should operate to eliminate all limitations of liability found in the Warsaw Convention reads too much into an unrelated act of Congress. That act was intended to deal with various monetary matters and only incidentally affected the provisions of the Warsaw treaty. There is no reason to believe that Congress intended to declare Article 22 obsolete.
>
> Rather, this Court believes it should enforce . . . the last official price of gold in the United States as the basis for conversion and liability limitation (*id.* at A-13).[4]

Moreover, the need for Supreme Court resolution of the Warsaw limitation question is underscored by the Fifth Circuit's recent statement in *Boehringer, supra* note 4, that

> it will withhold the disposition of the above cause pending the Supreme Court's ruling on the petition for certiorari and subsequent disposition on the merits if certiorari is granted, in Franklin Mint v. TWA . . . (letter from Chief Deputy Clerk, Fifth Circuit, to counsel after oral argument on the merits (March 4, 1983)).

Undoubtedly, the guidance which the Fifth Circuit seeks from this Court will be equally beneficial to other circuit and district courts, as well as to the public. Supreme Court guidance is

4. Three federal courts decided the identical issue prior to the Second Circuit's decision. *Franklin Mint Corp. v. Trans World Airlines, Inc.*, 525 F. Supp. 1288 (S.D.N.Y. 1981), applied the last official price of gold. Apparently unaware of the *Franklin Mint* decision rendered several weeks earlier, *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 531 F. Supp. 344 (S.D. Tex. 1981), *appeal docketed*, No. 81-2519 (5th Cir. Feb. 2, 1982), applied the free market price of gold. Finally, after analyzing both of the foregoing decisions, *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F. Supp. 833 (E.D.N.Y. 1982), *aff'd on other grounds*, No. 82-7616 (2d Cir. April 8, 1983), applied the last official price of gold.

particularly important in this case because uniformity of interpretation is a primary purpose of the treaty. *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 337-38 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); *Reed v. Wiser*, 555 F.2d 1079, 1090 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); United States' brief at 3. For this reason alone certiorari should be granted.

In sum, for the reasons set forth in TWA's petition for certiorari (No. 82-1186), among which are substantial constitutional questions, its petition should be granted. Nevertheless, Franklin Mint's petition should also be granted since the issues raised by that petition are clearly of sufficient weight to require review by this Court. Indeed, as the United States observed in its *amicus* brief, which also suggests that both petitions should be granted, resolution of the questions presented by the Franklin Mint petition "entails consideration of the issues raised by TWA" (United States' brief at 17).

POINT II

IN THE EVENT THAT BOTH PETITIONS ARE GRANTED, TWA SHOULD BE TREATED AS THE PETITIONER

Since it is clear that the granting of either or both petitions will ultimately bring the same substantive issues before the Court, it is respectfully submitted that if both petitions are granted, TWA should be deemed the petitioner for purposes of the briefs on the merits. Notwithstanding the substantial nonconstitutional issues raised by both the parties and the *amici curiae*, the primary reason for this Court's review of the Second Circuit's decision is to consider the substantial constitutional question of whether the Second Circuit exceeded its power by nullifying a treaty to which the United States is a party. Since TWA will argue the affirmative on this constitutional issue, it is respectfully submitted that TWA should be deemed the petitioner if both petitions are granted.

CONCLUSION

Both TWA's petition and Franklin Mint's petition for certiorari should be granted. In addition, in the event that both petitions are granted, TWA should be deemed the petitioner for the proceedings on the merits.

Respectfully submitted,

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May 20, 1983

APPENDIX

A-1

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 81 C 656

MASCHINENFABRIK KERN, A.G.,

Plaintiff,

v.

NORTHWEST AIRLINES, INC. and
J. E. BERNARD & CO., INC.,

Defendants.

MEMORANDUM OPINION AND ORDER

The plaintiff Maschinenfabrik Kern, A.G. ("Kern") filed this action against defendants Northwest Airlines, Inc. ("Northwest") and J. E. Bernard & Co. ("Bernard") in the United States District Court for the Northern District of Illinois. Kern seeks contract damages in the amount of $74,171.00 for injury to its duplicating machines during air shipment from the United States to Switzerland. The fact and extent of damage on delivery is undisputed. Bernard and Northwest, however, disclaim any liability for the damage. Northwest's disclaimer is made under the notice provision of the Warsaw Convention. 49 U.S.C. § 1502, Art. 26.[1] In the event it is found liable, Northwest also seeks a limitation of liability under Article 22 of the Convention. Bernard and Northwest cross claim against each other seeking

1. The Warsaw Convention, formally known as the "Convention for the Unification of Certain Rules Relating to International Transportation by Air," is a multilateral Convention for the unification of certain rules relating to international transportation by air, concluded at Warsaw, on October 12, 1929. 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11. Both the United States and Switzerland are parties. Adherence of the United States was proclaimed on October 29, 1934.

indemnification and Bernard has filed a third party complaint against Cheshire, Co. ("Cheshire"). Subject matter jurisdiction is predicated on 28 U.S.C. § 1332(a)(2)[2] and 28 U.S.C. § 1337.[3] Venue in this district is proper.

Presently before the Court is Northwest's motion for summary judgment. For the reasons given below, Northwest's motion is denied. Summary judgment is granted in favor of Kern on the issue of liability as against Northwest. The Court finds that the only proper way to limit liability in accordance with the policy of the Warsaw convention is at $9.07 per pound of damaged goods, by reference to the last official price of gold. Nonetheless, Northwest's motion for partial summary judgment on the issue of liability limitation is denied. Kern's charge that Northwest's conduct is wilful and an exception to the liability limitation is inappropriately decided by summary disposition. Whether Bernard or Cheshire are liable to Kern, or whether any of the parties must indemnify one another, remains to be resolved.

FACTS

Kern is a business entity organized under the laws of Switzerland and is a citizen of a foreign state. Northwest, a Minnesota corporation with its principal place of business in Minnesota, is a common carrier by air. Bernard, a New York corporation, with its principal place of business in Illinois, is a forwarder of freight over land. Cheshire, a subsidiary of Xerox Corporation, has its principal place of business in Mundelein, Illinois.[4]

---

2. 28 U.S.C. § 1332(a)(2) provides that "the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds . . . $10,000.00 . . . and is between . . . citizens of a state, and foreign states or subjects thereof."

3. 28 U.S.C. § 1337 provides that "the district courts shall have original jurisdiction of any civil action . . . arising under any Act of Congress regulating commerce or protecting trade." The instant action arises under the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*

4. Service of process could not be executed upon Cheshire. On June 20, 1982, a summons was personally served on the Xerox corporation. Thus far Xerox has not answered or otherwise pled, although its attorney filed an appearance on July 20, 1982.

The damaged duplicating machines, valued at $74,171.00, are Kern's property. Kern had loaned them to Cheshire to test their suitability for possible introduction into the United States market. Pursuant to the agreement between Kern and Cheshire, Cheshire was responsible for arranging to ship the machines back to Kern in Switzerland.

On or about January 29, 1979, Bernard received Kern's duplicating machines from Cheshire for shipping to Kern in Switzerland. On or about February 9, 1979, Bernard transferred the machines to Northwest, the carrier engaged to airship the machines to Kern. Northwest, however, was only one carrier in a chain of air carriers involved in the shipment of the machines. When the duplicating machines left O'Hare Airport in Chicago, Illinois, they travelled first via Northwest (the origin carrier), then on British Airways and finally on Swiss Air (the destination carrier). Neither Swiss Air nor British Air are named parties in this suit.

When the machines arrived in Switzerland, agents of Swiss Air noted damage to them and prepared a "cargo damage report." A cargo damage report is a preprinted form designed to document any damage or loss sustained by goods during transportation. In addition to providing a place for general information, *e.g.*, the airway bill number and last point of loading, a place is provided in which to indicate damage observed. In the instant case, the cargo damage report indicates that the duplicating machines were "broken," that the container in which the machines were crated also was "broken" and that the crates had no inner packing material. The report further recites that the damage was discovered during "an inbound check and customs clearance," although it does not indicate the country in which the machines were located when the damage was discovered.

On February 9, 1981, Kern sued Northwest and Bernard claiming damages in the amount of $74,171.00 plus costs. Since the machines' aggregate value is $74,171.00, the damage claimed is equivalent to total destruction of the machines.[5] In count I of

5. Actually the amount claimed is less salvage value.

its two-count complaint, Kern alleges that Northwest failed to deliver the duplicating machines in the same good condition as the machines allegedly were in when received by Northwest from Bernard. Alternatively, count II alleges that Bernard failed to deliver the duplicating machines to Northwest in the same good condition as the machines allegedly were in when received by Bernard from Cheshire.

Apparently, none of the defendants dispute the nature and extent of the damage to the duplicating machines. Northwest, however, denies all liability and raises two affirmative defenses. First, Northwest claims that it is not liable for any damage to the duplicating machines because Kern did not notify Northwest of such damage within the seven day time period for notification required under Article 26 of the Warsaw Convention. Second, Northwest says that even if Northwest is liable for injury to the machines, its liability is limited under Article 22 of the Warsaw Convention to $9.07 per pound. That ceiling on liability would greatly diminish any recovery by Kern from Northwest.

Northwest and Bernard cross claim against each other. Northwest says that although Bernard delivered the machines to Northwest with an unremarkable airway bill, the airway bill prepared by Bernard falsely portrayed the condition of the machines. Rather Northwest admits that a panel of one machine was loose, that its legs had broken through the skids and that the machines were wrapped only in plastic and set on wooden skids. Northwest claims it told Bernard of the poor packaging and refused to accept the machines for shipment. Allegedly at Bernard's persistence, Northwest reexamined the packaging, recanted and shipped the machines. Northwest says that it marked the airway bill with an "exception" to indicate that the machines were defectively packed on receipt from Bernard.

Bernard also disclaims liability to Kern. Additionally, its crossclaim against Northwest states that it delivered the machines to Northwest in good order, as proved by the "clean" airway bill which accompanied the machines to Northwest's terminal. It is Bernard's position that the exception noted on the

airway bill was added by Northwest to reflect an after-delivery injury to the machines. Bernard also filed a third party complaint against Cheshire. That complaint alleges that if the machines were delivered by Bernard to Northwest in damaged condition, the cause was some action or inaction by Cheshire in packing because Cheshire prepared the machines for shipment.

Discussion

I. Notice Provision of Warsaw Convention: Article 26

Northwest's motion for summary judgment is based on Kern's alleged failure to notify Northwest of the damage to the duplicating machines within the time specified by the Warsaw Convention. Article 26 of the Convention requires that notice of damage to goods must be made in writing to the carrier within seven days of the date of receipt of goods. Written notice is given either by writing upon a document of transportation or by a separate written notice. 49 U.S.C. § 1502, Art. 26. Article 26(4) further provides that failure to comply with the written notice requirement shall prevent any action against the carrier for damage to goods transported by the carrier, absent fraud by the carrier. Since Northwest claims that it first received written notice of the damage several weeks later, Northwest says that Article 26(4) precludes any recovery by Kern from Northwest.

To the contrary, Kern argues that the Warsaw Convention only requires written notice to any one carrier among successive carriers so long as the transportation performed is considered a single transportation. 49 U.S.C. § 1502, Art. 1(3). Under this view, it is irrelevant that Northwest may not have received notice within seven days because Swiss Air, a successive carrier on a single trip, had timely notice. Kern submits that notice to Swiss Air is demonstrated by the cargo damage report prepared by Swiss Air's agent. That report was written before delivery of the machines to Kern, well within the seven day notice period.

The Court first must decide whether Article 26 should be construed to require notice to all successive carriers, including the origin carrier, or whether notice to any successive carrier will suffice. Article 26(2) requires that

> [in] case of damage, the person entitled to delivery must complain to *the carrier* forthwith after the discovery of damage, and at the latest, within . . . 7 days from the date of receipt in the case of goods.

Thus, Article 26(2) does not specify whether the proper carrier to receive notice of damage is the "origin" carrier (Northwest), the "destination" carrier, (Swiss Air) or each carrier in the chain; it only requires that notice be given to "the" carrier.

Article 26 may be interpreted in two ways. The construction favored by Northwest is strict, satisfied only by giving written notice to each carrier. Conversely, Kern urges a liberal construction, satisfied by giving notice to any of the successive carriers involved in a single transportation of goods.

In deciding this issue, the Court is guided by the rules of treaty construction set out by the Fifth Circuit.

> In construing [a] treaty, as other contracts, we give consideration to the intent of the parties so as to carry out their manifest purpose. . . . We proceed under the admonition that where a treaty admits of two constructions, one restrictive of and the other favorable to the rights claimed under it, the latter is preferred.

Board of County Commissioners v. Aerolineas Peruansa, 307 F.2d 802, 806-07 (5th Cir. 1962). Clearly the more liberal construction is the one advanced by Kern. Modern air transportation often results in the use of many carriers for a single journey. Some of the carriers are unknown to the owner of goods shipped. It is reasonable, therefore, to conclude that written notice of damage to one carrier involved in the air transportation of the goods satisfies the written notice requirement under Article 26 of the Warsaw Convention.

Article 1(3) of the Convention supports the conclusion that notice to any one carrier is sufficient. Article 1(3) provides that transportation to be performed by several successive carriers shall be deemed to be one undivided transportation, if the parties regard it as a single operation. It is reasonable to conclude that the participants viewed the transportation of the duplicating machines from Illinois to Switzerland as a single operation. No separate contracts were entered into between Cheshire and Bernard, Bernard and Northwest, and Northwest and the successive air carriers. There is no evidence that there was any long break in the machines' journey, beyond the time required to off-load the machines from one carrier and onto the next. Thus, for the purposes of the Convention, the transportation of the machines from Illinois to Switzerland is a single transportation. If the journey is a unitary one, notice to Swiss Air within seven days should satisfy Article 26.

Furthermore, Article 30(3) provides that successive carriers shall be jointly and severally liable for damage sustained to goods during transportation. Thus, under Article 30(3) all air carriers who participate in a single shipment are potentially liable for damage sustained to the goods transported, irrespective of which carrier actually caused the damage. Arguably, the drafters of the Convention determined that it would be inequitable to compel the injured party to identify the precise carrier in a chain which caused the damage. This is especially true since the carriers, and not the owner of the goods, usually have exclusive control over the facts of damage. *See Dalton v. Delta Airlines, Inc.*, 570 F.2d 1244 (5th Cir. 1978). Consequently, the injured party may sue all of the carriers involved with a single transportation of goods. The burden is on each carrier to absolve itself from liability.

The rationale underlying Article 30(3) is equally applicable to an interpretation of Article 26. Given the relatively short time period within which written notice must be given, it would be unfair, if not impossible, to force the damaged party to discover the "culprit" as a predicate to giving notice under Article 26.

The Court concludes that an equitable interpretation of Article 26, especially in light of Article 30(3) and Article 1(3), is that timely written notice to one carrier in the chain of a unitary transportation of damaged goods is sufficient. In effect, it is notice to all.

There is no merit to Northwest's argument that because Kern did not make Swiss Air a party to the instant action, the principles of Article 30(3) are inapplicable to Article 26. In Northwest's view, only "parties to a suit" are within the protection of Article 26. The purpose of the notice requirement under Article 26, however, is to give those involved in the transportation of goods an opportunity to determine the cause of damage. *See Dalton v. Delta Airlines, Inc., supra; Hughes-Gibb & Co. v. Flying Tiger,* 504 F. Supp. 1239 (N.D. Ill. 1981). Kern's decision as to whom to sue is not determinative for the purpose of Article 26 notice.

There is still another reason why Northwest cannot disclaim notice of damage as a way of avoiding liability to Kern. Northwest had *actual notice* of at least possible damage to the duplicating machines even before the machines began their air trip to Switzerland. Northwest marked the airway bill it received from Bernard to indicate that the machines were poorly packaged. The agent decided to ship the machines, allegedly because if damaged, they likely would not be damaged further in shipment. Its agent also admits that a panel of one machine was loose and its legs protruding through the plastic. Thus, the purpose of Article 26, to give the carrier an opportunity to determine the cause of damage, is not thwarted. While Northwest may not have conclusively known that the machines were damaged when they left O'Hare, it certainly was on notice of a problem with the shipment and knew where to begin looking for the source of the damage.

For the reasons stated above, the Court denies Northwest's motion for summary judgment. Furthermore, the Court grants summary judgment in favor of Kern on the issue of Northwest's

liability. The fact of damage is undisputed and there no longer is any genuine issue as to whether Kern made a proper notice of damage under Article 26. Fed. R. Civ. P. 56(a).

II. Limitation of Liability: Article 22

Northwest also seeks partial summary judgment as to the amount of damages that it can be required to pay to Kern. Article 22 of the Warsaw Convention limits a carrier's liability for damaged goods to 250 French gold francs per kilogram. That sum was to be converted "into any national currency in round figures." 49 U.S.C. § 1502, Art. 22(4). As of 1973, the conversion rate was approximately $9.07 per pound of goods. As the two duplicating machines weighed a total of 5,000 pounds, Northwest seeks a finding that the maximum amount for which it can be held is $45,850.00.

Kern opposes Northwest's suggestion for limiting liability by arguing that Article 22 is obsolete because the "gold standard" underlying the international monetary exchange system is defunct. Kern seeks to limit liability in reference to the current free market price of gold.

In order to understand either party's position, a brief review of the international monetary exchange system pursuant to the Warsaw Convention follows. At the time that Article 22 was enacted, the conversion from francs to dollars was contemplated in reference to gold and not to some national currency like the pound or the dollar. This was done in order to avoid fluctuations in the value of a particular national currency which might result from unilateral action by the government whose currency was selected as the peg in the liability clause. *See, e.g., Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 531 F. Supp. 347, 350 (D.C. Tex. 1981), and the authorities cited therein. In 1934, the United States established an official price of $35.00 an ounce for gold. Gold Reserve Act of 1934, ch. 6, § 12, 48 Stat. 342 (1934); Presidential Proclamation No. 2072, 48 Stat. 1730 (1934). Although that official price varied some, the policies of the International Monetary Fund ("IMF")

kept the price of gold relatively stable for the next 40 years. IMF's relevant monetary policy was centered on a system of international currency exchange based on assigned par values of each nation's currency. The par values were tied to the dollar value of gold at $35.00 per ounce. *Boehringer Mannheim v. Pan American, supra,* at 350 n.16. Adding to the stability of the price of gold was the ban prohibiting American citizens from dealing in gold. Gold Reserve Act of 1934, ch. 6, §§ 3, 6, 48 Stat. 340 (1930) (repealed by Par Value Modification Act of 1973, Pub. L. No. 93-110, 87 Stat. 353 (1973)).

Events in the late 1960's and early 1970's led to the 1971 decision by the United States to stop converting its dollar into gold reserves. *See* S. Rep. No. 678, 92d Cong. 2d Sess. 4, *reprinted in* [1972] U.S. Cong. & Ad. News 2209, 2212. Thus, the U.S. dollar value for gold became hypothetical. At the same time, the use of the price of gold as the anchor of the IMF system of international currency exchange became doubtful. *Boehringer Mannheim v. Pan American, supra,* at 350 n.29. There followed in 1971 and 1973 two devaluations of the United States dollar, Par Value Modification Act of 1972, Pub. L. No. 92-268, § 2, 86 Stat. 116 (1972); Par Value Modification Act of 1973, Pub. L. No. 93-110, § 1, 87 Stat. 353 (1973), and consequent increases in the "official" price of gold to $38.00 and $42.22 an ounce, respectively. Then, in 1973, the United States ratified an amendment to an IMF agreement to abolish the concept of an official price of gold. Act of Oct. 19, 1976, Pub. L. No. 94-564, 90 Stat. 2660 (1976). Finally, on April 1, 1978 the official price of gold was rescinded simultaneously with the effective date of the IMF amendments. *See* 22 U.S.C. § 286a note (Supp. II 1978).

Subsequent to the 1973 devaluation of the dollar, the Civil Aeronautics Board ("CAB") directed the airlines to set tariffs for limiting liability to reflect the new "official" price of gold of $42.22 an ounce. Order 74-1-16, Dkt. 26274, adopted Jan. 3, 1974, 39 Fed. Reg. 1526 (1974). *See* 14 C.F.R. § 221.38(j) (1981) (requiring limitations to be set out in carrier tariffs). Liability was set to $20.00 per kilogram of damaged goods, or

$9.07 per pound. However, after the United States abandoned its "official" price of gold in 1978, the CAB did not revise the limiting tariffs. Although the CAB expressed concern that there was no longer any legal basis for using the $9.07 limitation, *see* Bureau of Consumer Protection, Civil Aeronautics Board, Memorandum on Warsaw Convention Liability Limits, at 4, its Bureau of Compliance and Consumer Protection suggested that the CAB should continue to engage in the "legal fiction" that an official gold price exists in order to satisfy the liability limiting goals of the Warsaw Convention. *Id.* at 6. The result of the CAB's decision not to revamp its tariff of liability is that at a time when the free market price of gold has risen to more than $400.00 an ounce, airlines may calculate their liability limitation based on an artificial, non-existent gold price of $42.22 an ounce.

Against that background, this Court must decide whether Northwest's liability should be cut off at $9.07 per pound of damaged merchandise, the fictional standard; whether another limiting standard should be used, such as the current free market price of gold; or whether Northwest's liability to Kern should be unlimited. In *Franklin Mint Corp. v. Trans World Airlines*, 690 F.2d 303 (2d Cir. 1982), the Second Circuit was faced with virtually the identical issues as are presented here. The Second Circuit first held that Article 22 is indeed unenforceable by courts of the United States. However, the *Franklin Mint* court also declined to adopt any of the proffered alternatives for determining liability, and has held that prospectively there will be no liability limit.

The parties had suggested four possible standards to be used to limit liability: (1) the last official price of gold in the U.S.; (2) the free market price of gold; (3) the Special Drawing Right ("SDR"), a unit of account established by the IMF;[6] or (4) the

6. *Franklin Mint, supra* at 310, provides a description of the SDR based, in part, on Ward, "SDR in Transport Liability Conventions: Some Clarifications," 13 *J. Mar. L. Com.* 1, 3 (1981): The SDR was created by the IMF in 1969 to replace gold and foreign currency in the international money reserve markets. IMF banks exchange SDRs for other convertible currencies as though they were lines of credit against which reserves are borrowed for use in central banks. Methods of

exchange value of the current French franc. Among the reasons given by the *Franklin Mint* court for rejecting the various alternatives were: a lack of international agreement on the proper unit of conversion; congressional repeal of the last official price of gold ($42.22); SDR's are created by the IMF without basis in the Warsaw Convention; the French franc is subject to unilateral change; and the highly volatile condition of the free market price of gold. *Id.* at 310-11. *Cf. Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc., supra,* (after 1978, the only proper basis for determining a carrier's liability limitation is with reference to the free market price of gold).

In declining to select any proposed alternative the Second Circuit concluded that it lacked the authority to set policy as to a new unit of conversion in an international matter:

> Treaty advice and consent and proposal is the province of the executive and ratification is the exclusive province of the United States Senate. While federal courts are necessarily called upon to interpret treaties, they must observe the line between treaty interpretation on the one hand and negotiation, proposal and advice and consent and ratification on the other . . . . However, selection of a unit of conversion and the level of value of a limitation on liability is plainly a matter to be negotiated by the parties, as the history of the Convention demonstrates.

690 F.2d at 311 (citations omitted).

Although the Second Circuit held that Article 22 is unenforceable, its ruling is prospective. This was because *Franklin Mint* overruled prevailing precedent in the United States, a decision

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calculating SDRs change over time, but currently are calculated in reference to the U.S. dollar, the Deutsche mark, the French franc, the Japanese yen, and the pound sterling. The amount of any of the five currencies in one SDR is a function of the percentage weights assigned to each currency. The dollar value of one SDR is calculated by adding the dollar value of each currency included based on the daily market exchange rate. SDRs tend to be less prone to fluctuation than the free market price of gold. This relative stability led the Warsaw signatories to propose that the SDR be adopted as the official unit of conversion for the Warsaw Convention (Montreal Protocols). Congress was presented this proposal in 1977 but it has so far failed to ratify it.

not foreshadowed. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). As to cases arising before the issuance of the mandate in *Franklin Mint*, the last official price of gold would be used to calculate damage liability. 690 F.2d at 312. Although the opinion does not expressly so state, its effect is that liability for damage to goods by air carriers on international flights will be unlimited.

This Court also has no authority to select an alternative basis for limiting liability, absent congressional direction. However, Northwest's liability should not be unlimited, since the clear intention of the Warsaw Convention in Article 22 was to limit the liability of air carriers on international runs. To conclude as the Second Circuit did in *Franklin Mint* that the action of Congress in eliminating an official price of gold should operate to eliminate all limitations of liability found in the Warsaw Convention reads too much into an unrelated act of Congress. That act was intended to deal with various monetary matters and only incidentally affected the provisions of the Warsaw treaty. There is no reason to believe that Congress intended to declare Article 22 obsolete.

Rather, this Court believes it should enforce the position taken by the CAB, the governmental agency most intimately concerned with the transactions at hand, and recognize the last official price of gold in the United States as the basis for conversion and liability limitation. That price, resulting in a liability limitation of $9.07 per pound of damaged goods, also was relied upon in *In re Air Crash Disaster at Warsaw Poland on March 14, 1980*, 535 F. Supp. 833 (E.D.N.Y. 1982) and by the lower court in *Franklin Mint Corp. v. Trans World Airlines*, 525 F. Supp. 1288 (S.D.N.Y 1981), *rev'd* 690 F.2d 303 (2d Cir. 1982). Any change from this base should be determined by the executive and the legislature. Air carriers, at least in this country, have relied upon the last official price of gold and have filed tariffs based on that rate. Thus, the public had notice of the liability limitations.

Parties, such as the commercial entities in this case, may protect themselves through insurance. They are not made victims of hardships or injustice by the maintenance of the CAB rule.

Kern raises a second argument for unlimited liability premised on Article 25. Article 25 provides:

> (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as . . . is considered to be equivalent to wilful misconduct.
>
> (2) . . . or if the damage is caused by any agent of the carrier acting within the scope of his employment.

Kern asserts that Northwest's actions in accepting the duplicating machines with full knowledge of their inferior packaging constitutes wilful conduct sufficient to invoke Article 25. To the contrary, Northwest argues that its decision to ship the machines, arguably damaged and unquestionably poorly packaged, was not wilful misconduct. In its view, to accept Kern's argument would be to suspend liability limitation whenever a carrier made an exception on an airway bill and subsequent damage was claimed.

For purposes of Article 25 of the Warsaw Convention, wilful misconduct occurs where an act or omission is taken with knowledge that the act probably will result in injury or damage or with reckless disregard of the probable consequences. *See, e.g., Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532, 536-37 (2d Cir. 1965); *Grey v. American Airlines, Inc.*, 227 F.2d 282, 285 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956); *Excelled Sheepskin and Leather Coat Corp. v. ATC Services*, 16 Avi. 17, 609 (N.Y.S. Ct. 1981). Wilfulness is largely a subjective matter. The questions of fact which must be resolved makes summary disposition inappropriate. *Id.* Thus, whether Northwest's liability to Kern is limited to $9.07 per pound (or $45,850.00) or whether Northwest is liable for $74,171.00 must be determined at trial.

Several other matters remain. First; the Court must determine whether and to what extent Bernard or Cheshire are liable

for damage to Kern's duplicating machines. Bernard and Cheshire are land transporters not air carriers. They are not bound by the provisions of the Warsaw Convention. Second, Xerox Corporation, which was served with summons in place of its subsidiary Cheshire, has neither answered nor otherwise pled to Bernard's third party complaint. Accordingly, if service of process was valid, Bernard is given seven days in which to move for a default, or else the third party complaint will be dismissed for want of prosecution.

In accordance with this Opinion, IT IS HEREBY ORDERED that:

(1) Summary judgment is granted for Kern and against Northwest Airlines on the issue of whether Kern gave timely notice of damage to its goods pursuant to Article 26 of the Warsaw Convention.

(2) Pursuant to Article 22, Northwest's liability is limited to $9.07 per pound or $45,850.00. However, judgment will not be entered in that amount pending resolution of whether Northwest's decision to ship the duplicating machines as packaged constituted wilful misconduct sufficient to incur unlimited liability pursuant to Article 25.

(3) Bernard is given until April 12, 1983 to move for a default against Cheshire, and must support its motion with an affidavit showing service of process on Xerox to be good service, or the third party complaint brought by Bernard against Cheshire will be dismissed for want of prosecution.

A status hearing is set for April 25, 1983 at 9:45 a.m.

Entered:

WILLIAM T. HART
United States District Judge

Dated: April 5, 1983.

No. 82-1465-CFX
Status: GRANTED

Title: Franklin Mint Corporation, et al., Petitioners
v.
Trans World Airlines, Inc.

Docketed:
March 1, 1983

Court: United States Court of Appeals
for the Second Circuit

Vide:
82-1186

Counsel for petitioner: Foster, John R.

Counsel for respondent: Romans, John N.

Entry	Date	Note	Proceedings and Orders
1	Mar 1 1983	G	Petition for writ of certiorari filed.
2	Mar 1 1983		Appendix of petitioner Franklin Mint Corp., et al. filed.
3	Apr 6 1983		DISTRIBUTED. April 22, 1983
4	Apr 7 1983	X	Brief amicus curiae of United States filed. VIDED.
5	Apr 20 1983	F	Response requested.
6	May 20 1983		Brief of respondent Trans World Airlines, Inc. in opposition filed.
7	May 25 1983		DISTRIBUTED. June 9, 1983
8	Jan 20 1983	D	Motion of International Air Transport Association, et al. for leave to intervene in No. 82-1186 filed.
9	Jun 13 1983		Motion of International Air Transport Association, et al. for leave to intervene in No. 82-1186 DENIED. The alternative request to treat the brief as a brief amici curiae in No. 82-1186 is granted.
10	Jun 13 1983		Petition GRANTED. The case is consoliated with 82-1186 and a total of one hour is allotted for oral argument.
			**********
12	Jul 11 1983		Order extending time to file brief of respondent on the merits until August 29, 1983.
13	Aug 29 1983		Brief amicus curiae of Air Transport Assn. of America filed. VIDED.
14	Aug 29 1983		Brief amicus curiae of Internatl. Air Trans. Assn. filed. VIDED.
15	Aug 29 1983		Joint appendix filed. VIDED.
16	Aug 29 1983		Brief of respondent Trans World Airlines, Inc. filed. VIDED.
17	Sep 7 1983		Brief amicus curiae of United States filed. VIDED.
18	Sep 8 1983	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Sep 20 1983	D	Motion of Mark Hammerschlag and Ellen Van Fleet for leave to participate in oral argument as amici curiae and for divided argument filed.
22	Oct 3 1983		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
24	Oct 11 1983		Motion of Mark Hammerschlag and Ellen Van Fleet for leave to participate in oral argument as amici curiae and for divided argument DENIED.
26	Sep 22 1983		Order extending time to file brief of petitioner on the merits until October 12, 1983.

No. 82-1465-CFX

Entry	Date	Note	Proceedings and Orders
27	Oct 12 1983		Brief amicus curiae of Mark Hammerschlag, et al. filed. VIDED.
28	Oct 12 1983		Brief of petitioners Franklin Mint Corp., et al. filed. VIDED.
29	Oct 18 1983		CIRCULATED.
30	Oct 24 1983		SET FOR ARGUMENT. Wednesday, November 30, 1983. (1st case) This case is consolidated with No. 82-1186. (1 hour)
31	Oct 5 1983		Brief amicus curiae of Boehringer Mannheim Diagnostic filed. VIDED.
32	Nov 10 1983	X	Reply brief of respondent TWA in 82-1186 filed. VIDED.
33	Nov 30 1983		ARGUED.